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THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1997 TERM

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C.W. SMITH, SMITH'S LAKE CORPORATION and

GRADY SMITH, Petitioners,

vs.

GWINNETT COUNTY, GEORGIA, Respondent.

* * * * * * * * * * * * * * * *

On Petition for Writ of Certiorari to the

Supreme Court of Georgia

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APPENDIX

* * * * * * * * * * * * * * * *

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In the Supreme Court of Georgia

Decided: June 2, 1997

S97A0388: Smith et al. v. Gwinnett County, Georgia

THOMPSON, Justice.

Gwinnett County brought suit against C.W. Smith, Grady Smith, and Smith's Lake Corporation, to enjoin defendants from engaging in any construction activity on property known as Freeman Lake. Following a hearing, the trial court issued a preliminary injunction, enjoining defendants from "grading, excavating, repairing the dam, cutting, destroying, or otherwise harming any of the trees or vegetation located on the [Freeman Lake] property ... until such time as the defendants receive a land disturbance permit from Gwinnett County."

One month later, the County moved to have defendants held in civil and criminal contempt of the preliminary injunction, asserting that they "have continued to

dump dirt, concrete, and debris in order to raise the grade of certain portions of the [Freeman Lake] property" and to commercially develop the property in violation of the "letter and spirit" of the preliminary injunction. The county also moved to compel discovery, alleging that both C.W. Smith and Grady Smith failed to attend their scheduled depositions. Before these matters were heard, the parties entered into a consent order, which reads, in part, as follows:

> [T]he parties having reached a settlement with regard to all issues involved in the motion to compel and motion for contempt, the parties having announced such settlement to the court, it is hereby ordered that the defendants shall retain a licensed engineer knowledgeable in the field of dam reconstruction within two weeks of the date of entry of this order. The defendants will direct the engineer ... to render a report concerning the safe reconstruction of the Freeman Lake Dam in accordance with engineering

standards ... [and to set forth] his or her instructions for the safe repair of the dam within thirty (30) days of being retained by the defendants. It is further ordered that within thirty (30) days of the engineer's issuance of such report, the defendants shall commence the repair of the Freeman Lake Dam so as to accomplish the restoration of Freeman Lake ..."

Weeks later, the County moved to have defendants held in contempt of the consent order, alleging that they failed to repair the dam and restore the lake. The County added that the lake constituted a nuisance and posed health risks to neighbors. Before the matter was heard, the County amended its motion, asserting defendants should also be held in contempt of the preliminary injunction because they cleared, graded and excavated a portion of the property "which is completely unrelated to the repair of the Freeman lake dam."

Evidence presented at the hearing demonstrated that

defendants graded the land and cleared the trees in a buffer area apart from the dam without obtaining a land disturbance permit. It also demonstrated that, when confronted with their conduct, defendants took the position that they could do what they wanted to do with their property.

The trial court found defendants in criminal contempt of the preliminary injunction and ordered C.W. Smith and Grady Smith to be incarcerated for twenty days and to each pay a $500 fine. In addition, the trial court took control of the Freeman Lake property pursuant to its equitable powers. In this regard, the trial court directed the County to restore the lake to its original condition, repair the dam and buffers, and "assess any and all reasonable costs ... against the defendants." Defendants appeal.

1. In their first enumeration of error, defendants assert the trial court erred in finding them in criminal contempt of the preliminary injunction. In this regard, defendants posit that the preliminary injunction was

superseded by the consent order and that, therefore, it was no longer in effect. We disagree.

The preliminary injunction enjoined defendants from repairing the dam, as well as from commercially developing the Freeman Lake property. Although a fair reading of the consent order demonstrates that the parties settled their differences concerning the motion to compel and motion for contempt, and that defendants were no longer enjoined from repairing the dam, it cannot be read as permitting defendants to resume the commercial development of the property. On the contrary, the consent order makes it clear that defendants' obligation to restore the lake remained in force. To say that, by virtue of the consent order, defendants were no longer enjoined from destroying the surrounding property defies the plain language of the consent order and common sense. "It is the spirit more than the letter of the injunction to which obedience is required." Patten v. Miller, 190 Ga. 123, 159 (8 S.E.2d 757)(1940). Besides, defendants were bound to obey

the preliminary injunction at their peril. They could not rely on their own interpretation of the consent order. If they were in doubt as to what they could or could not do without violating the preliminary injunction, they should have sought a modification or construction of its terms. General Teamsters Local Union No. 528 v. Allied Foods, Inc., 228 Ga. 479, 481 (186 S.E.2d 527)(1971); Warner v. Martin, 124 Ga. 387, 391(2)(52 S.E. 446)(1905).

The evidence authorized the trial court to find defendants guilty of criminal contempt beyond a reasonable doubt. In re Crane, 253 Ga. 667, 669(2)(324 S.E.2d 443)(1985).

2. The injunction does not give rise to an inverse condemnation of the Freeman Lake property. The trial court merely took control of the property to repair the dam and restore the lake. It did not work a destruction of defendants' private property without just and adequate compensation. Compare Lamar Advertising of South Georgia, Inc. v. City of

Albany, 260 Ga. 46, 47(389 S.E.2d 216)(1990).

3. The trial court did not exceed its powers in ordering the County to repair the dam and restore the lake at defendants' expense. "Where equity acquires jurisdiction for any purpose it will retain jurisdiction to give full and complete relief, whether legal or equitable, as to all purposes related to the subject matter." Fuller v. Dillon, 220 Ga. 36(1f)(136 S.E.2d 733)(1964); O.C.G.A. 23-1-7.

Judgment affirmed. All the Justices concur.

SUPREME COURT OF GEORGIA

Case No. S97A0388 Atlanta, July 11, 1997

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

C.W. Smith et al. v. Gwinnett County, Georgia

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sherie M. Welch, Clerk

FILED OCTOBER 15, 1996

IN THE SUPERIOR COURT

FOR THE COUNTY OF GWINNETT

STATE OF GEORGIA

CIVIL ACTION FILE NO. 95-A-5000-3

GWINNETT COUNTY, GEORGIA, Plaintiff,

vs.

C.W. SMITH, SMITH'S LAKE CORPORATION, and

GRADY SMITH, Defendants.

ORDER FOR CONTEMPT, INJUNCTIVE,

AND OTHER EQUITABLE RELIEF

Gwinnett County's Motion for Contempt having come on regularly before this Court on Friday, October 4, 1996 at 1:30p.m., and the parties having presented evidence and argument with regard to all issues involved in the Motion for Contempt, this Court hereby finds as follows:

FINDINGS OF FACT

This Court finds that Judge Winegarden's

Interlocutory Injunction entered on September 11, 1995 continues in full force and effect.

This Court finds that the Freeman Lake dam extends from the intersection of Beaver Ruin Road and Plantation lane along Plantation Lane to an area adjacent to Tax Parcel 6-175-28 shown on Plaintiff's Exhibit 1, which fronts on Plantation Lane.

This Court further finds that the Consent Order entered by Judge Winegarden on March 22, 1996 authorized the repair of the dam without the necessity of the issuance of a Land Disturbance Permit.

This Court further finds that since Judge Winegarden's hearing of July 18, 1996, C.W. Smith, Grady Smith, and Smith's Lake Corporation have engaged in conduct in violation of the Interlocutory Injunction by knocking down trees, grading, and excavating, without first obtaining a Land Disturbance Permit from Gwinnett County. These activities have occurred in an area away from, and

completely unrelated to, the dam. This Court further finds C.W. Smith and Grady Smith have personally knocked down trees, graded, and excavated within the 75-foot buffer on the property adjacent to the residential areas along Arcadia Drive and Park Lake Subdivision.

This Court further finds that defendants have intentionally ruptured a sewer connection from the Presswood property on Arcadia Drive across the Freeman Lake property to an existing sewer main, and the Defendants have also prohibited County crews from coming upon the Freeman Lake property to repair the ruptured line. This Court finds that the Smiths' refusal to allow the County to repair the line resulted in the Presswood property remaining without a sewer hookup until a Temporary Restraining Order was issued by this Court on the morning of October 4, 1996.

This Court further finds that the Smiths have also prohibited other County employees from coming upon the Freeman lake property to determine whether violations of

County ordinances have occurred. This Court further finds that the Defendants have ignored the suggestions and recommendations of David Chastant, the County's chief engineer in charge of monitoring the dam during the construction process. This Court further finds that the Smiths have repeatedly been asked by the County to stop knocking down trees, clearing, and grading, but the Smiths have failed to do so.

This Court further finds that Gwinnett County has issued daily citations to the Smiths in an effort to stop the Smiths from violating the provisions of this Court's previous Orders as well as County ordinances, but the Smiths have ignored the citations and have continued to clear and grade in violation of this Court's Order. This Court further finds that the Smiths' activities on the subject property away from the dam would have required a Land Disturbance Permit from Gwinnett County prior to initiating such activities. This Court finds that the Smiths failed to obtain such a permit and

also failed to seek the Court's direction with regard to clearing and grading before the activity commenced.

This Court finds that the Smiths' joint and concerted actions constitute repeated willful violations of this Court's Order of September 11, 1995.

CONCLUSIONS OF LAW

Based upon the Smiths' conduct in violation of this Court's Order of September 11, 1995, this Court finds the Defendants C.W. Smith, Grady Smith, and Smith's lake Corporation in civil and criminal contempt of Court beyond a reasonable doubt. See O.C.G.A. 15-1-4 (a) (3). The Court notes that C.W. Smith specifically testified on cross-examination that even if he had to go to jail, he could not be stopped from removing trees on the subject property. Trans. P. 114. This Court finds such conduct to be in direct violation of the September 1995 Injunction. This Court further finds that the County has no adequate remedy at law and that a fine, in and of itself, would be insufficient to obtain

compliance with this Court's Order. The Court orders that the Defendants C.W. Smith and Grady Smith be incarcerated for 20 days each and pay a fine of $500 each.

IT IS HEREBY ORDERED that employees of Gwinnett County may enter upon the subject property without fear of trespass to repair the dam; to restore the 75-foot buffer adjacent to residential areas; to restore the lake to its condition and dimension prior to the Smiths' breach of the dam; and to protect the health, safety, and welfare of Gwinnett County citizens in accordance with applicable orders of local, state, and federal regulatory agencies. This Court hereby appoints James Burton as the Court ordered Monitor and orders that Gwinnett County shall submit to the Court and James Burton a written proposal regarding the details, including costs, of the repair of the dam and the restoration of the lake and buffers within a reasonable time, a copy of which will be furnished to Defendants' counsel, Mr. Hughel Harrison, for review and objections, if any. The

repair of the dam and the restoration of the lake and the buffers shall occur within 90 days. If the County finds an extension of time necessary, the Court will approve such extension for good cause shown.

This Court further orders that Gwinnett County shall assess any and all reasonable costs in completing the repair of the dam and restoration of the lake and the buffers against the Defendants. These costs will be personally assessed against the Defendant Corporation and each Defendant individually. If necessary, Gwinnett County shall be entitled to reimbursement for any and all reasonable costs incurred in bringing the repair of the dam and restoration of the lake and the buffers to a successful completion in compliance with applicable local, state, and federal regulations and requirements. This Court orders the County to obtain three telephone quotations and contract with the lowest responsive bidder for each aspect of the repairs in question. The Court notes that in utilizing its equitable powers, the Court has the

authority to attach the property for any costs in connection with repairing the dam and restoring the buffers and the lake, as well as for all costs in connection with any related restoration that is reasonable and necessary pursuant to this order. If necessary, Gwinnett County shall have the right to attach the property for all costs associated with the repair of the dam and the restoration of the lake and the buffers as provided in this Order upon application to the Court and a Court Order concerning the same. See O.C.G.A. 23-4-37.

Pursuant to is equitable powers, this Court also takes control of the entire Freeman Lake property as described on Exhibit "A" attached to the Interlocutory Injunction of September 11, 1995. The Court further orders that there will be no further disturbance of the subject property of any kind or in any way whatsoever unless approved by James Burton. James Burton shall be authorized to go on or about the property at any time as an officer of the Court to examine the circumstances and provide notice to the Court of any

infringements of these Orders. This Court further orders that the Defendants' existing equipment on the property shall not be used for construction, excavation, or otherwise absent the express written approval of James Burton. The Court further notes that if a permit is required for any land disturbing activity, such permit must be obtained prior to the commencement of such activity.

This Court cautions the Defendants that if this Court's Orders are again violated, there will be additional contempt sanctions as well as criminal charges, if appropriate. The Court cautions the Defendants that obstruction of police officers will be deemed an obstruction of justice, and if such activity occurs, criminal warrants will be obtained.

The Court further awards the County reasonable attorney's fees incurred in connection with this contempt proceeding in an amount to be determined in a future hearing. The Court will consider in the future any reasonable attorney's fees incurred in connection with the repair of the

dam and the restoration of the lake and the buffers that the Court has ordered herein.

The Court notes that Defendants' counsel has filed a Notice of Appeal, and the Notice of Appeal shall act as a supersedeas with regard to the portion of this Court's Order dealing with criminal contempt, that is, the incarceration of the Defendants for 20 days and the two $500 fines. See O.C.G.A. 5-6-13. The remaining equitable portions of this Order, however, are not governed by the supersedeas of the Notice of Appeal; the County may begin the repair of the dam and restoration of the lake and the buffers during the pendency of the appellate process, if any. See O.C.G.A. 9-11-62(c); Howard v. Smith, 226 Ga. 850, 852 (1970). This Court concludes as a matter of law that the County's efforts in repairing the dam and restoring the lake and the buffers do not constitute a taking of the subject property but merely constitute an exercise of the County's police powers to protect the health, safety, and welfare of County residents.

Finally, this Court orders that all matters of record, including professional reports, shall be available to those persons and/or companies hired to repair the dam and restore the lake and the buffers so as to facilitate such repair and restoration in the most economical manner.

SO ORDERED this the 14th day of October, 1996 nunc pro tunc to October 4, 1996.

K. Dawson Jackson, Judge

Gwinnett Superior Court

FILED MARCH 25, 1996

IN THE SUPERIOR COURT

FOR THE COUNTY OF GWINNETT

STATE OF GEORGIA

CIVIL ACTION FILE NO. 95-A-5000-5

GWINNETT COUNTY, GEORGIA, Plaintiff,

vs.

C.W. SMITH, SMITH'S LAKE CORPORATION, and

GRADY SMITH, Defendants.

CONSENT ORDER

The above-styled action having come on regularly before this Court on March 15, 1996 at 2:00 p.m. for a hearing concerning Gwinnett County's Motions to Compel Discovery and for Contempt, and the parties having presented evidence and argument, and the parties having reached a settlement with regard to all issues involved in the Motion to Compel and Motion for Contempt, and the parties having announced such settlement to the Court,

IT IS HEREBY ORDERED that the Defendants shall retain a licensed engineer knowledgeable in the field of dam reconstruction within two weeks of the date of entry of this Order. The Defendants will direct the engineer of their choice to render a report concerning the safe reconstruction of the Freeman Lake Dam in accordance with engineering standards.

IT IS FURTHER ORDERED that the Defendants shall require the engineer of their choice to issue a written report concerning his or her instructions for the safe repair of the dam within thirty (30) days of being retained by the Defendants.

IT IS FURTHER ORDERED that within thirty (30) days of the engineer's issuance of such report, the Defendants shall commence the repair of the Freeman lake Dam so as to accomplish the restoration of Freeman Lake in accordance with regulations promulgated by the United States Army Corps of Engineers, the Federal Emergency Management

Agency, and their Engineer's report.

In the event that the engineer chosen by the Defendants determines that the debris dumped on the Freeman lake property, which debris is the subject of the County's Motion for Contempt, may be utilized in the reconstruction of the dam, it is hereby ordered that the Defendants may utilize such debris in the construction of the dam. In the event that the engineer chosen by the Defendants determines that the debris may not be utilized in the repair of the dam, however, it is hereby ordered that the Defendants shall remove all such debris from the subject property within ten (10) days of the issuance of the engineers report.

IT IS FURTHER ORDERED that the report furnished by the engineer chosen by the Defendants shall address the issues outlined by the County on Exhibit "A" which is attached hereto and by this reference made a part hereof.

IT IS FURTHER ORDERED that Gwinnett County's

Chief Engineer, David Chastant, shall be permitted to monitor all construction activity concerning the repair of the Freeman Lake Dam.

SO ORDERED, this the 22nd day of March, 1996.

RICHARD T. WINEGARDEN, JUDGE

GWINNETT SUPERIOR COURT

Order prepared by:

M.. Van Stephens, II

Attorney for Plaintiff

Order consented to:

G. Hughel Harrison

Attorney for Defendants

EXHIBIT "A"

The following is a summary of the parameters of the Engineering Study referenced in this Order:

1. Design of a concrete spillway

2. Design of the dimensions and placement of a pipe and catch basin

3. Compaction of the soil and other materials placed in the dam

4. Designation of the type of materials to be used to repair the dam

5. Designation of the use of rip rap for wave protection and slope protection on the dam

6. Completion of a Backwater Analysis and No Rise Study

FILED SEPTEMBER 11, 1995

IN THE SUPERIOR COURT

FOR THE COUNTY OF GWINNETT

STATE OF GEORGIA

CIVIL ACTION FILE NO. 95-A-5000-5

GWINNETT COUNTY, GEORGIA, Plaintiff,

vs.

C.W. SMITH, SMITH'S LAKE CORPORATION, and

GRADY SMITH, Defendants.

INTERLOCUTORY INJUNCTION

The above styled action having come on regularly before this Court on August 28, 1995 at 2:00 p.m., and the case having been continued until August 31, 1995 at 9:00 a.m., and counsel for all parties to this action having presented argument and evidence with regard to Gwinnett County's request for an Interlocutory Injunction,

IT IS HEREBY ORDERED that the Temporary Restraining Order issued on August 1, 1995 by Homer M.

Stark is hereby converted to an Interlocutory Injunction. This Court finds that the County has certain responsibilities to all County residents to maintain the health, safety, and welfare of the citizens of this County. It is hereby ordered that the Defendants Grady Smith, C.W. Smith, and Smith's Lake Corporation are restrained and enjoined from engaging in any construction activity, including grading, excavating, repairing the dam, cutting, destroying, or otherwise harming any of the trees or vegetation located on the real property described on Exhibit "A" and breaching or repairing the dam located on the subject property until such time as the Defendants receive a Land Disturbance Permit from Gwinnett County. The Defendants may, however, obtain written approval from Gwinnett County to conduct activities in contravention of this order in the event that Gwinnett County determines such actions to be within the County's best interests.

It is further ordered that the Defendants may erect a fence on the subject property so long as the fence meets all

requirements of local, state, and federal law.

SO ORDERED this the 8th day of September, 1995.

Richard T. Winegarden

Judge, Superior Court

Gwinnett County, Georgia

Order prepared by:

M. Van Stephens, II

Attorney for Plaintiff

FILED AUGUST 2, 1995

IN THE SUPERIOR COURT

FOR THE COUNTY OF GWINNETT

STATE OF GEORGIA

CIVIL ACTION FILE NO. 95-A-5000-5

GWINNETT COUNTY, GEORGIA, Plaintiff,

vs.

C.W. SMITH, SMITH'S LAKE CORPORATION, and

GRADY SMITH, Defendants.

TEMPORARY RESTRAINING ORDER

Plaintiff's Verified Petition for Temporary Restraining Order and supporting Affidavit having been read and considered, and the Court having examined the Certificate of Plaintiff's attorney concerning the notice given to the Defendants and the Court having determined that Defendants could reasonably be expected to have knowledge that the activity sought to be restrained is improper and that this action might occur,

IT IS HEREBY ORDERED that Defendants GRADY W. SMITH, C.W. SMITH, and SMITH'S LAKE CORPORATION are restrained and enjoined for a period of thirty (30) days from the date hereof or until further order of this Court, whichever is sooner, from engaging in any construction activity, including grading, excavating, repairing the dam, cutting, destroying or otherwise harming any of the trees or vegetation located on the real property described on Exhibit "A" and breaching or repairing the dam located on the subject property or allowing water from Beaver Ruin Creek from entering the lake - H.S..

IT IS FURTHER ORDERED that a hearing before this Court on the request for interlocutory injunction pending a final resolution of this action is hereby set for the 28th day of August, 1995 at 2:00 o'clock p.m.

SO ORDERED this 1st day of August, 1995 at 11:15 o'clock a.m.

Homer M. Stark

Chief Judge, Superior Court

Gwinnett County, Georgia

Order prepared by:

M.. Van Stephens, II

Gwinnett County Department of Law

EXHIBIT "A"

BK11224 PG0161

All that tract or parcel of land lying and being in Land Lots 174, 175, and 185, 6th District, Gwinnett County, Georgia and being more particularly described as follows:

BEGINNING at a point ... [legal description of property follows].

FILED JUNE 13, 1997

IN THE SUPERIOR COURT

FOR THE COUNTY OF GWINNETT

STATE OF GEORGIA

CIVIL ACTION FILE NO. 95-A-5000-3

GWINNETT COUNTY, GEORGIA, Plaintiff,

vs.

C.W. SMITH, SMITH'S LAKE CORPORATION, and

GRADY SMITH, Defendants.

ORDER

Gwinnett County's Motion to Proceed with the Removal of Downed Trees and Woody Debris, the Backfilling of Ditches, and the Stabilization of all Buffer Areas Disturbed at Freeman Lake having come on regularly for hearing on June 13th at 2:00P.M., and the parties having presented evidence and argument with regard to the same,

IT IS HEREBY ORDERED that Gwinnett County's Motion to Proceed with the Removal of Downed Trees and

Woody Debris, the Backfilling of Ditches, and the Stabilization of all Buffer Areas Disturbed at Freeman lake is hereby granted. This Court hereby authorizes Gwinnett County to contract with Gary's Grading and Pipeline Company, Inc. for the removal of downed trees and woody debris from the perimeter and interior of Freeman Lake at a cost not to exceed $75,373.25.

IT IS FURTHER ORDERED that Gwinnett County is authorized to contract with RSE Grading Company, Inc. for the backfilling of all ditches within the footprint of the lake and the stabilization of all buffer areas which were disturbed by the Smiths at Freeman lake for an amount not to exceed $197,060.00.

SO ORDERED this the 13th day of June, 1997.

K. Dawson Jackson, Judge

Gwinnett Superior Court

Order prepared by:

M. Van Stephens, II

Attorney for Plaintiff

Consented to as to form by:

G. Hughel Harrison